

**BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD**

In the Matter Between

{ Grievant }  
Grievant

Record of Proceedings  
Case No. 2006-003

And

Date: November 13, 2006

Department of State

**INTERIM DECISION: REMAND -  
EXCISION**

---

For the Foreign Service Grievance Board:

Presiding Member:

Garvin L. Oliver

Board Members:

Walter Greenfield  
Johnny Young

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Neera A. Parikh  
American Foreign Service Association

Representative for the Department:

Joanne M. Lishman  
Director  
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

## **CASE SUMMARY**

### **OVERVIEW**

The grievant, an Information Management Officer (IMO) with the Department of State (Department, agency), appeals the agency's decision to suspend him for five (5) calendar days without pay, and to place a notice of suspension in his Official Personnel Folder (OPF) for a period of two years, or until reviewed by all applicable boards. The proposed disciplinary action results from the agency sustaining charges that grievant misused government property, failed to follow security procedures, and attempted to influence hiring procedures.

Grievant rejects the first charge of misuse of government property stemming from an agency finding that U.S. Government licensed software had been installed on a personal computer (PC) in violation of 12 FAM 625.2-1c. Grievant contends that the agency shifted its emphasis from the initial allegation of having installed the software, as contained in its original notice of intent to propose disciplinary action, to whether he had instructed a Foreign Service National (FSN) subordinate to copy government-licensed software, without citing any regulation linked to the allegation.

The agency agreed that the preponderance of the evidence did not support a charge that grievant had installed, or caused the software to be installed, on the PC. However, the agency maintains that its investigation supports the charge that grievant instructed his subordinate to make copies of government-licensed software in violation of 5 CFR 2635.705.

Under the second charge of failure to follow security procedures in issuing a classified communications key, grievant maintains that he was authorized to take responsibility in issuing the key, and that since his actions did not warrant a security violation or infraction, the charge should be overturned. The agency maintains that grievant failed to follow security procedures, as the initial investigation found, and in so doing, violated 5 FAH-6 H-316 and H-323.

Grievant denies that he attempted to influence hiring procedures when he asked post personnel employees to consider a job application from an acquaintance, for a position in his section, after the deadline had passed for accepting such applications. He contends that he trusted that the application had been timely submitted, and may have been discarded due to some ethnic bias among the employees in the human resources office. The agency maintains that grievant's involvement with the process was inappropriate and in violation of personnel laws (5 U.S.C. 2302(b), 2301(b), and 5 CFR 2635.702).

We find that the agency has not met its burden in sustaining charge one, misuse of government property. At issue is the appropriateness of the Department's untimely finding that grievant did not install licensed software on a PC in violation of 12 FAM 625.2-1(c) but, instead, inappropriately instructed subordinates to make copies of

licensed software in violation of 5 CFR 2635.705. In disciplinary cases, an employee is due proper notice of charges in order to properly respond. (See 3 FAM 4353(1)) The notice of proposed disciplinary action is crucial. The agency must adhere to the original charge.

Under charge two, we find that grievant, as COMSEC<sup>1</sup> officer, had the authority to issue the communications key which is at the center of this dispute. Since DS/SI/IS did not find a security infraction or violation in this incident, we see no basis for sustaining a charge of failure to follow security procedures.

We find reasonable the agency's conclusions that grievant attempted to influence hiring procedures by injecting himself into the application process on behalf of an acquaintance. Grievant argues that it was not his intention to influence or manipulate the hiring process, but he offers little in the way of evidence to support his claim of good intentions.

Having failed to meet its burden in two of the three charges filed against the grievant, this decision is remanded to the agency in order to present additional argument or evidence that a 5-day suspension remains the appropriate penalty.

---

<sup>1</sup> Communications Security.

## **INTERIM DECISION: REMAND**

### **I. THE GRIEVANCE**

Grievant, {Grievant}, an Information Management Officer (IMO) with the Department of State (Department, agency), appeals the agency's decision to suspend him for five (5) calendar days without pay, and to place a notice of the suspension in his Official Performance Folder (OPF) for a period of two years or until the OPF has been reviewed by all applicable promotion boards. The proposed disciplinary action results from the agency's decision charging grievant with misuse of government property, failure to follow security procedures, and attempting to influence hiring procedures. Grievant maintains that the charges against him are erroneous and not based on fact, and therefore the proposed penalty must be overturned or mitigated.

For immediate relief, grievant requested that the proposed suspension be deferred, and that the letter of suspension not be placed into his OPF pending the outcome of the Board's decision. The Board received grievant's appeal on February 16, 2006, and granted, without agency objection, Interim Relief for a period of one year, or until a decision is reached, whichever comes first.

### **II. BACKGROUND**

After serving eighteen years in the U.S. Army, {Grievant} joined the Department in 1999 as an FP-5 IMO. He was tenured in 2001 and promoted in July 2002, and again in October 2003. Grievant had never been proposed for disciplinary action.

At the time of the alleged infractions giving rise to the disciplinary action, grievant was serving as the IMO at American Embassy {Blank}. In that capacity, {Grievant} was responsible for the post Information Program Center (IPC), the

Information Systems Center (ISC), diplomatic pouch/mail, switchboard, and the telephone/radio programs. He supervised three American direct-hire employees, and 24 Foreign Service National and PSA employees, while supporting a Mission comprised of 7 agencies numbering 90 Americans and 400 FSNs.

In December 2004, grievant received a letter from HR/ER notifying him that the Department proposed to suspend him, without pay, for a period of thirty (30) calendar days under the provisions of 3 FAM 4350. The proposed suspension was based upon a Report of Investigation (ROI) conducted by the Bureau of Diplomatic Security (DS). Investigators charged that grievant had made false statements, abused his official position, and misappropriated government property for his personal gain.

Exercising his right of appeal, {Grievant} responded to the three charges (one having three specifications) to the Deputy Assistant Secretary of State for Human Resources (deciding official) in April 2005. In June 2005, the Deputy Assistant Secretary issued a decision in which he dropped two of the three specifications associated with one of the charges, sustained the other two charges in total, and mitigated the proposed penalty to a suspension of five (5) calendar days without pay. He delayed, for 30 days, making the suspension letter a part of grievant's OPF.

{Grievant} filed a grievance with the Department on July 18, 2005, in which he challenged the agency's decision, and requested that the charges against him be overturned or that the penalty be mitigated. The agency sustained the proposed disciplinary action as amended in a January 2006 decision, whereupon grievant filed an appeal with this Board on February 16, 2006 -- followed by several supplemental submissions from both parties.

### Charge One, Specification 2: Misuse of U.S. Government Property<sup>2</sup>

. . . . A check of the DCM's personal computer found that U.S. Government licensed software had been installed on the personal computer. 12 FAM 625.2-1c states in part that, "The installation of U.S. Government software on privately owned microcomputers is prohibited when in violation of host country law, international copyright law, and/or a licensing agreement."

I sustain specification 2 of charge one. . . . Whether you yourself handed the software to the DCM (as stated) or you instructed a member of your staff to do it (as originally charged,) it was your duty to take care that the software you provided the DCM had the proper licenses.

### Charge Two: Failure to follow Security Procedures<sup>3</sup>

On May 18, 2004, you issued a classified piece of equipment, a key, to {Name}, an employee of the Embassy, without following the proper procedures for transferring responsibility for the key. Your subordinate pointed out your responsibilities at the time you handed over the key, yet you still did not complete the necessary paperwork. . . .

I sustain charge two. The preponderance of evidence leads me to conclude that you did not follow the proper procedures to issue the key card.

### Charge Three: Attempting to Influence Hiring Procedures<sup>4</sup>

On April 5, 2004, you admitted that you tried to have the HR office make an exception to the application deadline so that {Name} could apply for a position in your office even though you admit he did not qualify for the position. . . .

I sustain charge three. It is improper for you to have put pressure on the Human Resources staff as you did on behalf of your acquaintance. . . .

---

<sup>2</sup> From DAS's Decision, June 21, 2005

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

### III. POSITIONS OF THE PARTIES

#### The Grievant

Charge One, Specification 2: {Grievant} maintains, in a March 23, 2006 supplemental submission, that he has been erroneously and unjustly charged with the misuse of government property. He did not install, or ask anyone else to install, the U.S. Government licensed software found on the DCM's personal computer. In addition, he is unable to recall having ever asked FSN subordinate, {Name}, to copy any software for the DCM's use, or the use of anyone else. Grievant further asserts that the agency inexplicably shifted the emphasis from the allegation that he had installed software on the DCM's computer in violation of 12 FAM 625.2-1(c) (as outlined in the original notice of intent to propose disciplinary action), to whether he had instructed a subordinate to illegally copy software without citing any regulation tied to the allegation.

Charge Two: The charge of failing to follow security procedures must be overturned. {Grievant} contends that conflicting demands (DAO had waited 2 1/2 hours for a key) made it necessary for him to take direct action in expediting the issuance of a COMSEC key in order to facilitate communications. As COMSEC officer, he had the authority to issue the key and witness its destruction in the incident giving rise to this charge. To bolster his case, he cites the statement made by DS/SI/S after reviewing the incident:

{Name} [sic] has reviewed this incident and **we have decided that facts do not support the issuance of a valid COMSEC violation,** although there were some procedural errors/variances that took place. . . .  
(Emphasis in original)

HR/ER overstepped its authority in charging him with this offense. He admitted that he had committed some errors in procedure, but not enough to issue a security infraction or violation, and that only DS/SI/S can adjudicate security incidents.

Charge Three: Grievant denies that he was attempting to influence the hiring process. He was not trying to influence the process when he requested the post personnel section to consider a friend/contact's application for employment after the deadline for such consideration had passed. He was only interested in making sure that the applicant, one that he alleges was a valuable post contact, be treated fairly in the selection process. Grievant felt that it was necessary to take this action because it had come to his attention that there was bias among some post employees in regard to {Group} (applicant's sect). He trusted that the applicant had applied in a timely manner, and even though he thought him unqualified for the position, simply wanted to ensure equitable treatment in the process.

### **The Agency**

Charge One, specification 2: The Department concedes in its March 28, 2006 response to grievant's March 23, 2006 supplemental submission that the preponderance of evidence did not support the charge that grievant installed, or directed his staff to install, software on the DCM's home computer. A revised letter was attached to its grievance decision to reflect this conclusion. However, the agency confirmed that, based upon the ROI, {Grievant} had instructed his staff to make such copies, and that this charge was included in the original proposal and subsequent discipline charge. This conduct constituted a violation of 5 CFR 2635.705 due to his management position:

. . . An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those



required in the performance of official duties or authorized in accordance with law or regulation.

Charge Two: The charge that grievant failed to follow security procedures in issuing a COMSEC key is based on the finding, and subsequent charge, of an investigation conducted by DS/ICI/PR. Consequently, HR/ER charged grievant with failure to follow security procedures. During the course of the grievance investigation, the Department states that it contacted DS and confirmed that {Grievant}'s actions constituted a failure to follow security procedures. The charge was subsequently sustained by the DAS.

Charge Three: The agency asserts that grievant's involvement with {Name}'s application for employment was inappropriate and violated personnel laws (5 U.S.C. 2302(b), 2301(b), and 5 CFR 2635.702).

#### **IV. DISCUSSIONS AND FINDINGS**

When considering appeals involving discipline, the burden of proof is on the agency to show, by a preponderance of the evidence, that the disciplinary action is justified. (22 CFR 905.2) The determination of the nature and extent of the exercise of discipline rests with the agency. The Board's responsibility is to ensure that the action taken by an agency is reasonable, i.e., not arbitrary or capricious, and is consistent with laws and regulations. (See FSGB No. 92-52, March 12, 1996, referring to *Harper v. Department of the Air Force*, 61 MSPR 446 (1994)). In reaching its conclusions, the Board considers four factors:

- Did the employee commit the acts with which he/she is charged?
- Did the employee know, or should reasonably be expected to know, that those acts were improper and could lead to discipline? (The principles of due process require

that the agency inform the employee of what written procedures, regulations, or commonly understood policies were allegedly violated.)

- Is there a nexus between the employee's conduct and the efficiency of agency operations?
- Is the penalty imposed proportional to the offense and consistent with penalties imposed for similar offenses?

To sustain the proposed discipline, a 5-day suspension in this case, all four factors must be satisfied.

#### Charge One, Specification 2

In the original notice to propose disciplinary action, grievant was charged with having installed U.S. Government licensed software on a personal computer in violation of 12 FAM 625.2-1(c) which states in part:

. . . . The installation of U.S. Government software on privately owned microcomputers is prohibited when in violation of host country law, international copyright law, and/or a licensing agreement.

The DAS sustained this particular charge despite the fact that grievant had argued that there was not any proof that he had installed the software:

. . . . You dispute this specification on the grounds that you did not install the software on the DCM's personal computer yourself. . . . You state that you gave the DCM the disk with the Omni software her husband had requested. The Omni software found on the DCM's personal computer was licensed to the Department and therefore should not have been installed on the DCM's personal computer. Whether you yourself handed the software to the DCM (as you stated) or you instructed a member of your staff to do it (as originally charged,) it was your duty to take care that the software you provided the DCM had proper licenses.

Grievant denies having installed the software on the DCM's personal computer, and asserts that the agency has not offered any proof to sustain its allegation that he had done so. In addition, {Grievant} cites the testimony provided DS Investigators by the

DCM's husband, which specifically indicated that he ({Grievant}) had not installed the software.

In his March 25, 2006 supplemental submission, grievant continued to assert that he had been erroneously and unjustly charged with misuse of U.S. Government property. He asserted that the DAS erred in sustaining Specification 2 under Charge One. Grievant contends that the principal focus of the original charge under Specification 2 is the installation of government-licensed software on the DCM's computer, and not instructing an employee to make copies of software. He considers this a variance and supports his argument by underscoring the fact that the decision letter cites 12 FAM 625.2-1(c), which deals specifically with the question of installation. The letter fails to mention any regulation that he had violated in allegedly instructing an employee to copy software.

The Department answered grievant's supplemental in a March 28, 2006 response:

The agency did not find that the preponderance of evidence supports the charge that {Grievant} installed or directed his staff to install software on the Deputy Chief of Mission's home computer and thus amended the discipline letter to remove that reference. The revised letter was attached to the agency's grievance decision.

The agency further asserts that the DS investigation had concluded that grievant had directed his subordinates to inappropriately copy licensed software, and that this finding was included in the original proposal and subsequent discipline charge. Since {Grievant} was in a management position, the request constituted misconduct as specified in 5 CFR 2635.705:

. . . . [A]n employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

{Grievant} takes issue with the Department's response in an April 18, 2006

rebuttal:

. . . . The proposal letter signed by Teddy Taylor explicitly and solely cites 12 FAM 625.2-1(c) as the offending violation, which strictly addresses the installation of government software. That is the only regulation the Department charges me with violating in its proposal letter. There is no mention of any regulations regarding instructing employees to copy government software in the proposal letter. More importantly, the regulations referred to in the Department's response (5 C.F.R. 2635.705) [sic] was not cited in the proposal letter or in Mr. O'Keefe's decision letter. The Department cannot be allowed to alter the charges and raise new violations this late in the process. Moreover, the Department's manipulation of the charge seriously infringes on my due process right to notice. The Department should have listed all offending violations in the proposal letter, thereby affording me adequate and timely notice.

We find many of the material facts/admissions in this case to be relatively clear and not in dispute. DS Investigators concluded that {Grievant} instructed his subordinates to inappropriately copy licensed software. {Name}<sup>5</sup> passed Omni Page software to {Grievant}, who in turn, passed the CD to the DCM for delivery to her husband. The DCM's husband said he never paid anyone for the CD which was passed to him without any label or packaging. He also stated that {Grievant} had not installed the Omni software on his personal computer. DS Investigators found and removed U.S. Government licensed Omni Page software, similar to the software passed by {Grievant} to the DCM, on her husband's personal computer.

At issue in this case is the appropriateness of the Department's eleventh hour finding and charge that grievant did not install, or direct his staff to install, software on the DCM's personal computer, and the shifting of its focus to a subset of the charge that he had inappropriately instructed his subordinates to make copies of U.S. Government

---

<sup>5</sup> {Grievant}'s staff member, whom he allegedly directed to buy the Omni Page software for the DCM's home computer.

licensed software in violation of 5 CFR 2635.705. The agency maintains that this charge was included in the original proposal and subsequent discipline charge. We do not agree. We find that while the original language under Charge One, Specification 2, opens with an allegation (subsequently substantiated by DS Investigators) that grievant had instructed a staff member to copy and install government-licensed software at the DCM's house, the emphasis nevertheless rested on the fact that similar software was subsequently found on the PC. Moreover, {Grievant} was charged under 12 FAM 625.2-1(c) with having installed, or having caused to be installed, government-licensed software.

The agency may reasonably argue that instructing a subordinate to copy software, and subsequently having caused that same software to be installed on a personal computer, is part of the same illegal effort and directly linked to 12 FAM 625.2-1(c). However, we find that conclusion null, since by its own finding, the Department states that the preponderance of the evidence does not support a charge that grievant installed, or caused to be installed, government-licensed software on the DCM's PC.<sup>6</sup> Now, at the crucial moment of decision, having found that the preponderance of the evidence does not support the original charge that grievant installed, or caused to be installed, government-licensed software on a personal computer, as contained in the letter notifying grievant of proposed disciplinary action, the agency attempts to shift the emphasis from

---

<sup>6</sup> Teddy Taylor's letter proposing discipline, and the DAS's letter sustaining the charges, both refer to the DCM's personal computer, however, grievant's supplemental submission (March 23, 2006) references the husband's statement to DS investigators "Yes this was the CD that was used to install Omni on my computer." The Department clearly viewed the PC as belonging to the DCM, but was not overly concerned with personal ownership. Their major concern was that government licensed software had been installed on a personal computer contrary to regulation (which was subsequently changed to instructing a subordinate to carry out unofficial acts during work hours).

the act of installation to one of having instructed a subordinate to do something outside of official responsibilities, or not authorized by law or regulation.

In disciplinary cases, an employee is due proper notice of charges in order to properly respond. (See 3 FAM 4353(1)) The notice of proposed disciplinary action is crucial and the agency must justify disciplinary action based upon the original charge. We find that the Department has not met its burden under this charge. It is not sustained.

#### Charge Two

The agency charged grievant with a violation of 5 FAH-6H-316 and H-323 in that he failed to obtain a “hand receipt”<sup>7</sup> from the COMSEC custodian before removing a communications key from the IPC. Regulations require that a “hand receipt” be written at the time a key is issued. If a receipt is not written at the time of issue, the COMSEC custodian must witness the destruction, i.e., the placing of the key into the equipment before completing the destruction report. {Grievant} asserts, and we agree, that as COMSEC Officer, he had the authority to escort the DAO employee after the issuance of the key, and to witness its insertion, and de facto destruction, into the DAO equipment. Our agreement is based upon the expert opinion provided by DS:

As for authority of an IMO, here is the FAM cite that outlines the IMO’s responsibilities. While this cite does not say the IMO, fulfilling the duties of the COMSEC Officer, has any certain authority over the COMSEC custodian, it does give that implication. “5 FAM 121.1b(9)(c) The IMO is the post's communication Security (COMSEC) Officer and, with the COMSEC custodian, maintains the integrity of all COMSEC, [sic] assets at post.”

Grievant acknowledges that normal procedure envisions the initial issuance of a “hand receipt,” followed by a certified destruction report by the COMSEC custodian. He maintains, however, that a 2 and 1/2 hour delay in getting the DAO communication link

---

<sup>7</sup> Signed acknowledgment of taking possession of a communications key.

functioning prompted him to act to ensure the efficiency of his unit without breaching security requirements.

The DAS sustained Charge Two based upon an initial finding by DS Investigators that grievant had failed to follow proper security procedures for transferring a classified piece of equipment, a key. An agency-level grievance investigation subsequently confirmed with DS/SI/IS that:

{Name} [sic] has reviewed this incident and we have concluded that facts do not support the issuance of a valid COMSEC violation, although there were some procedural errors/variances that took place. At no time was classified information ever put at risk (which is the premier factor in our adjudication decision) . . . .

What is the best way to (graciously) resolve the issue at hand? Do I need to get back with {Name} to let her know about our findings, e.g., this is not a valid security incident, or should you take some action first to amend the proposal, or both?

The agency, however, concluded that grievant had issued COMSEC material without authorization based upon the ROI, and, therefore, saw no need to amend the proposed disciplinary action letter. {Grievant} was subsequently charged with failure to follow security procedures.

We are not persuaded by agency argument as to how it concludes that grievant issued COMSEC material without authorization, when DS/SI/IS implies that 5 FAM 121.1b(9)(c) gives the IMO authority over the COMSEC custodian in ensuring the integrity of COMSEC materials. We fail to see how grievant was acting outside his authority in this instance. DS/SI/IS found that no security incident or infraction occurred in this case, and does not define what it means by "some procedural errors/variances that took place." We find that the agency has not met its burden under this charge.

### Charge Three

The agency charges that grievant's involvement with the processing of an application for employment, submitted by an acquaintance, amounted to an attempt to influence hiring procedures. Grievant admits pressuring the Human Resources staff to extend the deadline after the normal deadline had expired, in order to ensure that the acquaintance's application was received. {Grievant} contends, however, that he had only sought to make sure that a valuable embassy contact was being treated fairly in the process, having concluded that there was a definite bias against {Group} among some Foreign Service National employees. He added that he had concluded that the applicant was not qualified for the job, and that he never had any intentions of hiring him should the application reach his desk.

Relying on the ROI, the agency found no support for the alleged bias within the HR staff and that the applicant, while a personal acquaintance of {Grievant}, had ever performed any particular service of value for the Embassy. Notwithstanding grievant's explanation, the agency found his actions inappropriate and a violation of personnel laws as well as Standards of Ethical Conduct. (See 5 U.S.C. 2302(b), 2301(b), and 5 CFR 2635. 702) As the selecting official in this particular case, it concluded that he was in a particularly sensitive position to decide who was going to be hired and as such, should have been particularly mindful of the appearance of equitable treatment.

We find that the agency has met its burden under this charge. 5 U.S.C. 2302(b) states in part that:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –



(1) discriminate for or against any employee or applicant for employment . . . .

Grievant avers that it was not his intention to influence or manipulate the hiring process, however, there is little in the way of evidence to support his claim of good intentions. He admittedly relied solely on the word of the applicant that he had submitted his application in a timely fashion to explain his request for an extension of the deadline. He states that he had experienced "missing applications" in the past, but offers only a memo of recollection to the RSO in explaining his apprehensions. {Grievant} offers no real proof to support his contention that the applicant provided valuable service for the Embassy which would justify his extraordinary interest in the process. In short, we find reasonable the agency's conclusion that grievant attempted to influence the hiring process. It has been supported by the preponderant evidence.

## **V. DECISION**

Charges 1 and 2 are not sustained. Charge 3 has been properly established.

The Board remands this case to the Department and directs it to determine the appropriate penalty consistent with 3 FAM 4375 in view of the fact that two of the original three charges that the Department considered when imposing the initial penalty were not sustained by the Board.

The Department's response shall be placed in the mail within 30 days of receipt of this INTERIM DECISION.